



September 11, 2001

Ms. Laura Garza Jimenez
County Attorney
Nueces County
901 Leopard, Room 207
Corpus Christi, Texas 78401-3680

OR2001-4049

Dear Ms. Jimenez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 151809.

The Nueces County Sheriff's department (the "department") received two requests for information related to Christopher Sanchez, Jose Orlando Sanchez Ortiz, Lucio Mendez, Bobby Stuart, and Andrew Sokolinski, who were incarcerated at various times in the Nueces County Jail. In addition, the requestor asks for information related to:

1. any deaths in the jail (other than by natural causes) since the election of Sheriff Larry Olivarez;
2. any allegations against jail guards of "brutalities or illegalities;"
3. any allegations of inmates being beaten or harmed by other inmates, whose actions were precipitated by a guard;
4. access to services the jail provides to inmates (such as access to a notary public);
5. jail rules which would allow jail guards to withhold inmate mail;
6. jail rules related to placing an inmate in "lockdown" capacity;

7. jail rules related to the allowed extent of punitive actions implemented by jail guards against inmates.

We note that you have not submitted information related to jail rules which would allow jail guards to withhold inmate mail, jail rules related to placing an inmate in "lockdown" capacity, and jail rules related to the allowed extent of punitive actions implemented by jail guards against inmates. We assume that to the extent that responsive information relating to these requests exists, that information has been released. *See* Gov't Code §§ 552.301, .302. You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

At the outset, we address whether this office has issued a previous determination on the required public disclosure of some of the requested information under section 552.103 of the Government Code. Under section 552.301, a government body must ask this office for a ruling whenever the government body seeks to withhold information responsive to a request. However, where there exists a previous determination, a government body is not required to ask this office for a decision and may instead withhold the information in accordance with the previous determination. The attorney general has identified two types of previous determinations, but only one is relevant here. *See* Open Records Decision No. 673 (2001). That type exists where the law, the facts, and the circumstances on which the ruling was based have not changed, where the requested information is precisely the same information as was addressed in the prior attorney general ruling, where the ruling is addressed to the same governmental body, and where the ruling concludes that the information is or is not excepted from disclosure. *Id.*

You represent that Open Records Letter No. 2001-1098 (2001) is a previous determination that the department may withhold information related to inmate Jose Sanchez Ortiz without the necessity of requesting an attorney general decision under section 552.301 of the Government Code. However, you do not indicate whether the facts and circumstances on which the previous ruling was based have changed. Therefore, we are unable to conclude that we have issued a previous determination for this information as set out in Open Records Decision No. 673. Therefore, we conclude that the department may not rely on Open Records Letter No. 2001-1098 as a previous determination to withhold the requested information related to inmate Jose Sanchez Ortiz under section 552.103 of the Government.

We first address your section 552.108 arguments. Section 552.108(a)(2) excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. Based on the information you provided, we understand you to assert that the submitted information related

to inmates Christopher Sanchez, Jose Orlando Sanchez Ortiz, Lucio Mendez, and Andrew Sokolinski pertains to cases that concluded in results other than conviction or deferred adjudication. However, we note that the information related to Christopher Sanchez, Jose Orlando Sanchez Ortiz, and Lucio Mendez are Internal Affairs Division investigations. We note that the section 552.108 exception is inapplicable to the department's internal administrative investigations that do not involve an investigation of crime. *See Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied). Therefore, section 552.108(a)(2) is only applicable to the information related to Andrew Sokolinski. Section 552.108(a)(2) is not applicable to the information related to Christopher Sanchez, Jose Orlando Sanchez Ortiz, and Lucio Mendez and must be released.

Moreover, section 552.108 is inapplicable to basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App. --Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, with the exception of the basic front page offense and arrest information, the department may withhold the submitted information related to Andrew Sokolinski under section 552.108(a)(2). We note that you have the discretion to release all or part of the remaining submitted information related to Andrew Sokolinski that is not otherwise confidential by law. Gov't Code § 552.007.

Next, we consider your section 552.103 claim for information relating to Bobby Stuart, Christopher Sanchez, and Jose Orlando Sanchez Ortiz. Such information is subject to section 552.022 of the Government Code. Section 552.022 states in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and are not excepted from required disclosure under this chapter unless they are expressly confidential under other law.

Gov't Code § 552.022. One such category of expressly public information under section 552.022 is "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by [s]ection 552.108...." Gov't Code § 552.022(a)(1). The submitted documents related to Christopher Sanchez, Jose Orlando Sanchez Ortiz, and Bobby Stuart are records related to completed investigations undertaken by the department's Internal Affairs Division. Therefore, pursuant to section 552.022(a)(1), the submitted information related to Christopher Sanchez, Jose Orlando Sanchez Ortiz, and Bobby Stuart must be released to the requestor unless it is confidential under another law or excepted from disclosure under section 552.108. You argue that the requested information is excepted from disclosure under section 552.103. Section 552.103, the "litigation exception," is a discretionary exception and not "other law" for purposes of section 552.022. Open Records Decision No. 473 (1987). Therefore, the department may not withhold the submitted information related to Christopher Sanchez, Jose Orlando Sanchez Ortiz, and

Bobby Stuart under section 552.103. With the exception of the following information, the department must release information relating to these individuals.

Second, some of the submitted information is confidential under section 552.101 in conjunction with the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides in pertinent part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

The MPA governs access to medical records. Open Records Decision No. 598 (1991). The MPA requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Moreover, information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code § 159.002(a), (b), (c); Open Records Decision No. 598 (1991). Upon review of the submitted documents, we conclude that some of the documents are subject to the MPA, which the department may release only in accordance with the MPA. We have marked the documents that are subject to the MPA.

Third, some of the submitted information is excepted under section 552.117(2) and section 552.1175 of the Government Code. Section 552.117(2) of the Government Code excepts from required public disclosure the home addresses, home telephone numbers, social security numbers, and family member information of peace officers as defined by article 2.12 of the Code of Criminal Procedure. Therefore, section 552.117(2) requires you to withhold this information of the department's peace officers.

Section 552.1175 provides in pertinent part:

(a) This section applies only to:

...

(2) county jailers as defined by Section 1701.001, Occupations Code;

...

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

- (1) chooses to restrict public access to the information; and
- (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Therefore, if the county jailers elected not to allow access to this information in accordance with the procedures under section 552.1175 of the Government Code and prior to the department's receipt of the present request, we believe the department must withhold this information from required public disclosure pursuant to section 552.1175. The department may not withhold the information of a county jailer who made the request for confidentiality after the request for information was made. Whether a particular piece of information is public must be determined at the time the request is made. Open Records Decision No. 530 at 5 (1989). We have marked the information that is subject to sections 552.117(2) and 552.1175.

Fourth, we note that some of the submitted information is excepted under section 552.101 of the Government Code in conjunction with federal law and subchapter F of chapter 411 of the Government Code. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given.") and (c)(2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Criminal history record information is defined as information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions. Gov't Code §411.082(2). Section 411.083 of the Government Code provides that any CHRI maintained by the Department of Public Safety (the "DPS") is confidential. Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute also is confidential and may be disclosed only in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Therefore, the department must withhold all such CHRI under section 552.101 in conjunction with federal law and subchapter F of chapter 411 of the Government Code.

Fifth, some of the submitted information is excepted under section 552.130 of the GovernmentCode. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

We have marked the Texas driver's license numbers that you must withhold under section 552.130.

Sixth, some of the submitted information is confidential under section 552.101 in conjunction with common law privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. The right of privacy lapses upon death. Open Records Decision No. 432 (1985). In addition, where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. See *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). The right to privacy lapses upon death. Open Records Decision No. 432 (1985). We have marked the information in the submitted documents that is excepted from required public disclosure under common law privacy in conjunction with section 552.101.

Finally, the submitted information contains social security numbers. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). See Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. See *id.* We have no basis for concluding that any of the social security numbers in the submitted documents are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that

section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number in the submitted documents, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law enacted on or after October 1, 1990.

In summary, the department may not rely on Open Records Letter No. 2001-1098 as a previous determination to withhold the requested information related to inmate Jose Sanchez Ortiz under section 552.103 of the Government Code. With the exception of the basic front page offense and arrest information, the department may withhold the submitted information related to Andrew Sokolinski under section 552.108(a)(2) of the Government Code. The department must withhold the information we have marked under sections 552.117(2), 552.1175, and 552.130 of the Government Code. In addition, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common law privacy and the indicated state and federal statutes. The department must release the rest of the information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

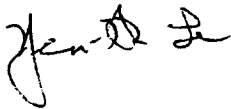
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/DKB/seg

Ref: ID# 151809

Enc. Marked documents

c: Mr. Michael C. F. White
2554 Lincoln Boulevard #209
Marina Del Ray, California 90291
(w/o enclosures)